



Securing America's Borders: The Role of the Intelligence Community

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Summary

Maintaining the security of U.S. borders is a fundamental responsibility of the Federal Government. Various border security missions are assigned to the Department of Homeland Security, the Department of Defense, and other Federal agencies that work in cooperation with state, local, and tribal law enforcement agencies. The success of their efforts depends on the availability of reliable information on the nature of potential threats to border security.

Given the extent of the land borders and the long coastlines of the U.S. and the number of individuals and vehicles crossing borders legitimately, the task of identifying law breakers within the overall threat environment is a major challenge. Law enforcement agencies obtain information from their usual sources—reports of crimes committed, tip-offs from informers, technical monitoring devices that now include unmanned aerial vehicles, and other sophisticated devices. In recent decades, and especially after 9/11, the potential for terrorists coming across the border as well as extensive narcotics trafficking have led policymakers to reach beyond law enforcement agencies to seek out information acquired by intelligence sources, including signals intelligence, imagery intelligence, and human agents.

Much of the contribution of intelligence agencies to the border security effort is classified and few details are publicly available. There is no public assessment of the intelligence contribution. Yet there are a number of concerns about the contribution of intelligence agencies that Congress may choose to review. First, border security missions might detract from traditional intelligence missions—monitoring the capabilities and intentions of major countries throughout the world and providing tactical intelligence to the military operations in which U.S. forces are engaged. Secondly, both intelligence and law enforcement agencies might in some situations be gathering information from the same sources, and there might be unnecessary and counterproductive duplication of effort. Thirdly, especially given the fact that many in the United States have deep and longstanding ties on both sides of the borders, observers are concerned that intelligence collection techniques might infringe the civil liberties of U.S. persons—citizens and legal residents. Finally, others point to the potential that the involvement of intelligence agencies in border security efforts could affect overall U.S.-Canadian and U.S.-Mexican relations.

As is the case with other “interagency” efforts in the Federal Government, congressional oversight of border security efforts is complicated by the number of different committees involved. Intelligence efforts are especially challenging in view of security classifications. Given public concerns about maintaining secure borders while protecting civil liberties, it is likely that the contributions of intelligence agencies to the larger border security effort may become a significant issue for congressional oversight. In addition, Members may seek to ensure that changes in authorization and appropriations for intelligence and law enforcement efforts be coordinated to ensure that productive sources of information are not neglected and that there is a proper balance among collection, analysis, and dissemination efforts. This report supplements CRS Report R40602, *The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress*, by Mark A. Randol.

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Background

The Border Security Effort

Maintaining the security of the borders of the United States is a fundamental responsibility of the Federal Government. Threats to the security of U.S. borders are varied—borders can be violated by foreign military forces, smugglers (especially narcotics smugglers), unauthorized visitors (including foreign terrorists), along with a wide number of environmental or agricultural hazards that originate in foreign countries. Border security has not been defined in law and the term has been used differently by commentators. This report will focus on specific types of threats to the security of U.S. borders, principally the land borders with Canada and Mexico.¹ Neither of these two countries poses a military threat to the U.S.; indeed, both are military allies with bilateral and trilateral networks of cooperative endeavors long in place. Extensive narcotics smuggling is a reality, however, and has been widely documented. Efforts to address the unauthorized immigration of Mexican and other foreign nationals are a major responsibility of Department of Homeland Security (DHS) and other Federal agencies.² There have also been concerns about terrorists entering or attempting to enter the U.S. from both countries in recent years. Many in the U.S. fear that the violence endemic in Mexico, largely connected to narcotics, could spill over into this country.³

The number of Federal agencies responsible for maintaining border security is significant—including the various components of DHS, especially Customs and Border Protection (CBP) and Immigrations and Customs Enforcement (ICE); the Defense and State Departments; the Agriculture and the Justice Departments, among others. Key responsibilities are exercised by state, local, and tribal agencies. DHS and the Federal Bureau of Investigation (FBI) have close working relationships with state, local, and tribal governments.

¹ A more expansive view of border security could include the threats posed by a wide variety of factors extending from intercontinental bombers or missiles, sea-based missile attacks to atmospheric or oceanic pollutants, and global warming. In most cases, however, public attention to “border security” focuses on the threats of unauthorized entry in the U.S., especially by potential terrorists, and by illegal shipments of narcotics. These threats are largely confined to the borders with Mexico and Canada and to a somewhat lesser extent to coastal shores; these challenges are the focus of this report. The possibility of unauthorized individuals or materials arriving on commercial airliners is a separate threat, but, as the airlines in question are legally allowed to enter U.S. airspace, the principal challenge is the establishment of an inspection regime in foreign countries; these issues are covered in CRS Report RL33512, *Transportation Security: Issues for the 111th Congress*, by David Randall Peterman, Bart Elias, and John Frittelli.

² A significant issue in any consideration of border security is illegal immigration even though most immigrants come to the U.S. for economic reasons—to find employment at higher wages than is available in other countries or to unite with relatives or close friends already in the U.S.. Although there are differing views in regard to the threat posed by illegal immigration, organizations devoted to human trafficking on a large scale present threats of a different order and any effort to smuggle in members of a terrorist organization (or weapons of mass destruction (WMD)) would definitely become a major national security concern.

³ See CRS Report R41075, *Southwest Border Violence: Issues in Identifying and Measuring Spillover Violence*, coordinated by Kristin M. Finklea.

A Role for Intelligence Agencies

Federal law enforcement agencies with border security responsibilities collect, analyze, and disseminate data regarding border security and share information with state, local, and tribal law enforcement agencies that, along with their Federal counterparts, are responsible for arresting suspected criminals and disrupting illegal activities. These agencies collect and make use of operational information such as border crossing and cargo manifest data. They use informants, screening devices designed to detect drugs, and even aerostats—tethered balloons—and drones. These types of efforts are not considered intelligence activities by the Director of National Intelligence (DNI) or the two congressional intelligence committees; they are not funded in authorization and appropriations legislation as intelligence activities. A description of their work lies beyond the scope of this report; they are addressed in CRS Report R40602, *The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress*, by Mark A. Randol.⁴

The work of U.S. intelligence agencies related to border security is necessarily classified, but, based on publicly available information, these agencies have a number of capabilities that are apparently being utilized to supplement information acquired from law enforcement sources.⁵ Although it is not possible based on unclassified materials to provide a metric for the value of intelligence information on border security efforts, these capabilities could make a significant contribution. The possibility of overhead surveillance from reconnaissance satellites is one example that could provide information on illegal narcotics production and transport facilities, tunnels under borders to escape detection, or terrorist training camps. Another significant resource is information derived from electronic surveillance—communications relating terrorist plans to penetrate U.S. borders or to transport weapons of mass destruction (WMD) or contacts with foreign agents in the U.S.. Still another resource are reports from human agents and from contacts within foreign governments relating to plans by terrorists or others to violate U.S. borders. Intelligence officers from the Drug Enforcement Administration (DEA) and other intelligence agencies have undertaken counternarcotics missions under dangerous and life-threatening conditions in Mexico and elsewhere. The Intelligence Community also has a sophisticated and systematic capability to analyze open source materials; Mexican, Canadian and other media outlets may provide useful information relating to U.S. border security.

Although border security is not defined in law, the Intelligence Community has some longstanding statutory missions that directly relate to protecting the U.S. homeland from various outside foreign threats. It collects and analyzes foreign intelligence which by definition includes international terrorist activities.⁶ Since at least the mid-1980s, counternarcotics has also been a concern for intelligence agencies.⁷ National intelligence (or intelligence related to national security) is defined in statute to include matters “bearing on national or homeland security.”⁸

⁴ See, in addition, CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Chad C. Haddal.

⁵ The roles and missions of U.S. intelligence agencies are briefly described in Office of the Director of National Intelligence, *National Intelligence: A Consumer's Guide*, 2009, http://odni.gov/reports/IC_Consumers_Guide_2009.pdf

⁶ 50 USC 401a(3).

⁷ For instance, the Anti-Drug Abuse Act of 1988, P.L. 100-690, sec. 4801, expressed the sense of the Congress “that, given the magnitude of the illicit drug problem and the threat it poses to the national security of the United States, agencies of the intelligence community should be more actively involved in the effort to combat illicit international drug trafficking.” 102 Stat. 4294.

⁸ 50 USC 401a(5)(iii).

Ultimately, subject to specific statutory restrictions, the Intelligence Community's priorities for collection and analysis are provided by the DNI in accordance with the direction from the President and the National Security Council (NSC).

The counterterrorism efforts of intelligence agencies—at present, their preeminent responsibility—include important missions that involve border security, *i.e.*, keeping potential foreign terrorists from gaining entrance to the U.S. as well as preventing the introduction of weapons of mass destruction across U.S. borders. Although efforts to counter terrorism and prevent the introduction of WMD into the U.S. heavily involve law enforcement agencies, they are also unquestionably the concerns of Federal non-law enforcement agencies including DOD and intelligence agencies. Actions the U.S. would take against such threats would not be limited to law enforcement, but could under some circumstances include active measures to attack the threat outside U.S. borders.

Particular Challenges for Intelligence Agencies

Narcotics trafficking almost invariably involves some U.S. persons—citizens and resident aliens—as participants in smuggling and as consumers, or facilitators of money transfers. Both statutory authorities and the official policies of the Obama Administration, as reflected in the Southwest Border Counternarcotics Strategy, now mandate involvement of the Intelligence Community beyond just intelligence agencies that have law enforcement missions in both counterterrorism and counternarcotics, two of the most important elements of border security. The Obama Administration has also made clear that the Intelligence Community is an important part of its counternarcotics efforts. The National Southwest Border Counternarcotics Strategy, published in June 2009 by the Office of Drug Control Policy, stated a strategic objective of enhancing intelligence capabilities associated with the Southwest border, noting that:

Over the next few years, the focus of these intelligence programs will be on improving and integrating the flow of timely and relevant intelligence and analysis—as well as the process of information sharing and coordination—among the Federal, State, local, tribal, and territorial agencies dedicated to protecting the Southwest border from the illicit flow of drugs and associated threats.

...

The intelligence efforts in this strategy will be aligned with and will incorporate other national intelligence efforts along the Southwest border, in particular those efforts coordinated by the Director of National Intelligence.⁹

Immigration is another major national issue, but not all aspects of illegal immigration are matters of concern for the Intelligence Community. To the extent, however, that illegal immigrants include terrorists, drug smugglers, foreign agents, or reflect significant levels of organized human trafficking, intelligence agencies will be collecting and analyzing relevant information.

⁹ U.S., Office of National Drug Control Policy, *National Southwest Border Counternarcotics Strategy*, June 2009, pp. 5-6. The role of the DNI in coordinating intelligence for counternarcotics was anticipated by a 1988 direction in a defense authorization conference report in which the “conferees direct the Secretary of Defense to work with the Director of Central Intelligence [the predecessor of the DNI] to ensure that the collection of drug interdiction information is established as a high priority for the intelligence community.” H.Rept. 100-989, p. 447.

The Intelligence Community (IC), as defined in statute,¹⁰ includes the Central Intelligence Agency (CIA), the National Security Agency (NSA), the National Reconnaissance Office (NRO), the National Geospatial-Imagery Agency (NGA), the Defense Intelligence Agency (DIA), the Bureau of Intelligence and Research of the State Department (INR), the intelligence elements of the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the military services and the Energy Department, and the Office of Intelligence and Analysis of the Treasury Department, the Office of Intelligence and Analysis and the Coast Guard in DHS. The organization and activities of these agencies are governed by the National Security Act of 1947, as amended, Executive Order 12333, *United States Intelligence Activities*, as amended, and other statutes. Funding of intelligence activities is authorized in annual intelligence authorization acts.

A few agencies have both law enforcement and intelligence responsibilities. In the Justice Department, the FBI and the DEA, elements of both of which are part of the Intelligence Community, have major law enforcement responsibilities.¹¹ Some DHS elements—the U.S. Coast Guard and the DHS Office of Intelligence and Analysis—are IC members and provide important information regarding border security issues.¹²

Officials responsible for border security missions have to identify information that can be collected (or is already being collected) by intelligence agencies related to border security issues that either cannot be collected by law enforcement agencies or that can be collected by law enforcement agencies only with great difficulty or expense. One problem has been the difficulties in information sharing which exist even within the Intelligence Community, but have been far more complicated when the need is to share intelligence information with law enforcement officials. The revelations after September 11, 2001 that intelligence and law enforcement agencies separately had incomplete pieces of information prior to the attacks on the World Trade Center and the Pentagon, but had been unable to assemble and properly analyze them led to statutory and policy changes.

Historically, intelligence agencies focused on the world outside U.S. borders and retained information for in-depth analysis of trends extending over decades; law enforcement agencies gathered information that could be used in near-term U.S. court cases. This distinction continues to complicate interagency coordination (and congressional oversight). Coordination among agencies has always been challenging and it has not always been achieved. In the aftermath of the attempted bombing of Northwest Airlines Flight 253 on December 25, 2009, the Senate Intelligence Committee concluded that inability to identify the bomber in advance was based in large measure on a failure to share information among relevant intelligence and law enforcement agencies.¹³

Different statutory frameworks govern the operations of intelligence and law enforcement agencies, especially those affecting the acquisition of information concerning U.S. persons. The National Security Act provides that the CIA “shall have no police, subpoena, or law enforcement

¹⁰ 50 USC 401a(4).

¹¹ Within the Intelligence Community, the FBI is represented by its National Security Division and the DEA is represented by its Office of National Security Intelligence.

¹² On the other hand, Customs and Border Protection (CBP) and Immigrations and Customs Enforcement (ICE) are in the Department of Homeland Security (DHS) and while they collect extensive information regarding border security issues, they are not IC members.

¹³ See U.S. Congress, Senate, Select Committee on Intelligence. *Unclassified Executive Summary of the Committee Report on the Attempted Terrorist Attack on Northwest Airlines Flight 253*, May 18, 2010.

powers or internal security functions”¹⁴ and that provision has served to limit CIA cooperation with law enforcement agencies over the years and reflects a congressional determination that the U.S. not have an all-encompassing intelligence agency that could undermine democratic protections. In the 1970s, in the wake of revelations that some intelligence agencies had improperly gathered information on U.S. citizens, the distinctions between law enforcement and intelligence were made more stringent, most significantly with the enactment and subsequent implementation of the Foreign Intelligence Surveillance Act (FISA) of 1978.¹⁵ FISA permitted electronic surveillance to gather foreign intelligence information in the absence of probable cause that criminal activities were planned or underway, but a whole web of rules and regulations evolved that restricted sharing of information derived from FISA surveillance and coordination of investigations with officials involved in criminal prosecutions.¹⁶

In the aftermath of 9/11, the U.S.A Patriot Act (P.L. 107-56) and other legislation was enacted that was intended to ensure that information held in any part of the Federal Government relating to terrorist activities could be shared with other government agencies involved with counterterrorism missions. The National Counterterrorism Center (NCTC) was established to analyze and integrate all intelligence possessed or acquired by any Federal agency relating to international terrorism and to ensure that appropriate agencies have access to all-source intelligence regarding counterterrorism.¹⁷ A number of fusion centers, such as the El Paso Intelligence Center also bring together information on relevant problems as discussed below. Currently, whereas law enforcement agencies necessarily maintain records on U.S. persons of interest, intelligence agencies maintain records on non-U.S. persons but, in general, are limited in respect to acquiring, maintaining or disseminating records affecting U.S. persons.¹⁸

There are, however, additional statutory constraints on cooperation between law enforcement and intelligence agencies. Posse Comitatus statutes beginning in the post-Civil War era with certain exceptions preclude DOD (including its intelligence elements) from becoming actively involved in law enforcement efforts.¹⁹ The National Security Act, as amended, allows the national intelligence agencies in DOD—NSA, the NRO, NGA, and DIA—to collect information about

¹⁴ 50 USC 403-3(d).

¹⁵ See CRS Report RL34279, *The Foreign Intelligence Surveillance Act (FISA): An Overview of Selected Issues*, by Elizabeth B. Bazan. While FISA has always made provision for sharing information regarding criminal activities that was incidentally acquired during a FISA surveillance, contemporaneous court cases and implementing guidelines limited communications between intelligence and law enforcement on related investigations.

¹⁶ See CRS Report RL30252, *Intelligence and Law Enforcement: Countering Transnational Threats to the U.S.*, by Richard A. Best Jr.. Another recent view of the evolving relationship is found in Stewart A. Baker, *Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism* (Stanford, CA: California University Press, 2010). For example, the USA Patriot Act permitted the use of FISA where a significant purpose of the electronic surveillance or physical search was the gathering of foreign intelligence information. Similar language was included in connection with acquisitions under the FISA Amendments of 2008. FISA, as amended, also permits coordination of intelligence and law enforcement efforts to investigate or protect against acts of a foreign power or an agent of a foreign power including actual or potential attack or other grave hostile acts, sabotage, international terrorism, the international proliferation of weapons of mass destruction, or clandestine intelligence activities.

¹⁷ 50 USC 404o(d)(1). For further information on NCTC, see CRS Report R41022, *The National Counterterrorism Center (NCTC)—Responsibilities and Potential Congressional Concerns*, by Richard A. Best Jr..

¹⁸ See E.O. 12333, sec. 2.3.

¹⁹ See CRS Report RS20590, *The Posse Comitatus Act and Related Matters: A Sketch*, by Jennifer K. Elsea. Limitations on DOD intelligence support to law enforcement agencies are set forth at 50 USC 403-5a. Several statutes enacted since the early 1980s provided DOD with authority to provide training and equipment to local, state, tribal and foreign law enforcement agencies; much of the training and equipment that DOD provides to foreign countries (and to some U.S. law enforcement agencies) does not involve intelligence agencies.

non-U.S. persons outside the U.S. for, and at the request of, law enforcement agencies. This provision does not apply to the intelligence organizations of the four military services.²⁰ Notwithstanding these provisions in the National Security Act, since the 1980's DOD has had specific statutory counternarcotics responsibilities that extend to its intelligence components.²¹

Epic and Other Fusion Centers

A number of fusion centers have been established where relevant agencies can maintain representatives and analysts and share information. Most fusion centers contain representatives from intelligence agencies.²²

The El Paso Intelligence Center (EPIC) in El Paso, Texas, a component of the Justice Department's Drug Enforcement Agency (DEA), was established in 1974 to serve as fusion center for information gathered by multiple agencies focused on counternarcotics and counterterrorism.²³ Most of the agencies represented at EPIC are law enforcement agencies and the role of intelligence agencies is not publicized. There is official acknowledgment that the NGA is represented at EPIC, but the significance of NGA's contribution is not described. Contributions from other intelligence agencies are provided to EPIC analysts through DHS, DEA, the Coast Guard, and the FBI. The Joint Task Force North (formerly Joint Task Force-6), a DOD military

²⁰ 50 USC 403-5a(b). The provision was added by sec. 814 of the Intelligence Authorization Act for FY1997, P.L. 104-293. An accompanying report noted that, "the law enforcement proviso of the National Security Act was intended to prohibit the CIA from infringing on the domestic jurisdiction of the FBI and from becoming a national secret police that might be directed against U.S. citizens. These concerns are not present when the Intelligence Community collects against foreign persons outside the U.S. At the same time, the need to combat terrorism, drug trafficking and other transnational threats effectively requires that the capabilities of the Intelligence Community be harnessed to support law enforcement agencies as efficiently as possible." U.S. Congress, 104th congress, 2d session, Senate, *Authorizing Appropriations for Fiscal Year 1997 for the Intelligence Activities of the United States Government and the Central Intelligence Retirement and Disability System*, April 30, 1996, S.Rept. 104-258, p. 35.

²¹ The National Defense Authorization Act for FY 1989, P.L. 100-456, section 1104, provided that "The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials." 10 USC 371. The conference report that accompanied the legislation stated in regard to this provision: "The conferees are sensitive to past concerns about use of the military for domestic intelligence gathering, and emphasize that this section does not modify in any way existing law with respect to the military's authority (or lack thereof) to collect and disseminate the intelligence information about American citizens in the United States and abroad." U.S. Congress, 100th Congress, 2nd session, *National Defense Authorization Act for Fiscal Year 1989*, H.Rept. 100-989, p. 450.

²² For a discussion of fusion centers that are part of DHS, see CRS Report R40602, *The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress*, by Mark A. Randol. DHS has relationships with some 72 federally recognized fusion centers across the country according to comments made by DNI James Clapper in an October 6, 2010 address to the Bipartisan Policy Center. There are in addition some 104 Joint Terrorism Task Forces (JTTFs) throughout the country organized by the FBI. Both the fusion centers and the JTTFs provides venues for sharing information, including intelligence information with state, local, and tribal officials.

²³ See <http://www.justice.gov/dea/programs/epic.htm>. According to the official website, the "[a]gencies currently represented at EPIC include the Drug Enforcement Administration; Department of Homeland Security; Customs & Border Protection; Immigration & Customs Enforcement; U.S. Coast Guard; Federal Bureau of Investigation; Bureau of Alcohol, Tobacco, Firearms and Explosives; U.S. Secret Service; U.S. Marshals Service; National Drug Intelligence Center; Internal Revenue Service; U.S. Department of the Interior; National Geospatial-Intelligence Agency; U.S. Department of Defense; Joint Task Force-North; Joint Interagency Task Force-South; Texas Department of Public Safety; Texas Air National Guard; and the El Paso County Sheriff's Office." Of these, the National Geospatial-Intelligence Agency (NGA), the FBI, DEA, DHS, and the Coast Guard are statutory members of the Intelligence Community; the NGA is the only agency listed that does not have law enforcement authorities.

command also located in El Paso and established to serve as the planning and coordinating operational headquarters to support local, state, and federal law enforcement agencies within the Southwest border region to counter the flow of illegal drugs into the United States.²⁴

Other fusion centers include the Joint Interagency Task Force-South, located at Key West, Florida under Coast Guard leadership and the Joint Interagency Task Force West in Hawaii as part of DOD's Pacific Command. U.S. Northern Command (NORTHCOM), headquartered in Colorado, receives support from the Intelligence Community and is responsible for homeland defense and coordinating DOD support to civil authorities, has an ongoing information exchange effort with Mexico and is assisting Mexican military officials in setting up an intelligence center.

Issues for Congress

Oversight of efforts to ensure the security of U.S. borders creates its own challenges. A large number of agencies oversee various aspects of border security efforts. DHS by itself is overseen by multiple congressional committees. Much of the information regarding the role of intelligence agencies is necessarily classified, often highly classified. The contribution of intelligence agencies must be carefully integrated with the work of law enforcement agencies at the Federal, state, local and tribal levels and with the contributions of Mexican, Canadian, and other foreign agencies. These efforts come under the jurisdiction of several committees including the intelligence, judiciary, homeland security, armed services, foreign relations, and appropriations committees. Border security is inherently an interagency effort.²⁵

Congress does not oversee a self-contained entity known as "border security;" rather, components and aspects of the effort are considered by a number of different committees. There are a number of areas relating to the role of the Intelligence Community that observers argue may warrant careful oversight. These include (a) balancing intelligence agencies involvement in border security efforts with their traditional intelligence missions throughout the world, (b) "deconfliction," ensuring that the work of intelligence and law enforcement agencies in border security missions is prudently organized and that agencies are not working at cross-purposes or with unnecessary duplication of effort, (c) that involvement of intelligence agencies in border areas does not improperly affect the civil liberties of U.S. persons, and (d) the potential effects of U.S. border security efforts on overall relations with Canada and Mexico (and potentially other countries).

Congress addresses border security issues in various authorization and appropriation bills and in regular oversight hearings. Oversight of the role of intelligence agencies, however, is affected by a number of special considerations. Congress authorizes and oversees intelligence activities separately from other governmental activities. There are also numerous statutory provisions that apply to intelligence agencies that differ significantly from those that govern the work of law

²⁴ See also CRS Report RL34070, *Fusion Centers: Issues and Options for Congress*, by John Rollins. The problems associated with providing classified information beyond Federal agencies is addressed in Executive Order 13549 of August 18, 2010, *Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities*.

²⁵ The challenges of the "Interagency" are discussed in CRS Report RL34455, *Organizing the U.S. Government for National Security: Overview of the Interagency Reform Debates*, by Catherine Dale, Nina M. Serafino, and Pat Towell.

enforcement agencies. There is even a separate court (the Foreign Intelligence Surveillance Court) that deals with surveillance by intelligence agencies.

The operations of intelligence agencies are funded through the National Intelligence Program²⁶ or the Military Intelligence Program.²⁷ There has been no overall budget request for border security in executive branch budget submissions nor, as far as is known from publicly available information, has there been specific line-item in intelligence budget requests (either as part of the National Intelligence Program or the Military Intelligence Program) for “border security.”

There is a statutory requirement that all intelligence activities must be “specifically authorized.”²⁸ This is not generally the case with law enforcement efforts. This provision may somewhat complicate shifting funds in counternarcotics, and perhaps other accounts to intelligence activities. For instance, Congress may approve DOD budgetary requests for the budget category, Drug Interdiction and Counterdrug Activities, that include, but are not limited to, intelligence activities. Thus, any shifting of funds within this account to intelligence activities might arguably lack “specific authorization.” Accordingly, the DOD’s Fiscal Year FY2011 Budget Estimates states that DOD “considers this request as notice to Congress pursuant to 50 U.S.C. § 414(a)(3)(C) that the Department of Defense intends to make funds appropriated for Drug Intervention and Counterdrug activities of the Department of Defense available for the all source collection of counterdrug intelligence. Further, the Department considers Congressional action on this budget request as satisfying the requirement of 50 U.S.C. § 414(a).”²⁹

Although a unilateral declaration by an executive branch agency may not in the view of some observers definitively resolve an issue of specific authorization, the DOD statement at least ensures that the concern is noted. The Intelligence Authorization Act for FY2010 (P.L. 111-259) includes a provision (sec. 101) that authorizes “appropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity as appropriated for fiscal year 2010, as modified by such reprogramming and transfers of funds authorized by and reported to the appropriate congressional committees.”

Balancing Intelligence Missions

Intelligence agencies serve multiple clients from the President down to junior-level military officers. The DNI is responsible for ensuring that national intelligence is provided to the White House, cabinet departments, Congress, and other senior officials. This responsibility extends to determining requirements and priorities for national intelligence collection, analysis, and dissemination. The Secretary of Defense has similar responsibilities and authorities for using military intelligence components to support the operating forces of the military.

Despite the increases in intelligence budgets since 9/11, resources are finite; intelligence support to homeland security missions may affect intelligence support to national security policymaking

²⁶ 50 USC 401a(6).

²⁷ See 50 USC 403-1(c)(3)(A).

²⁸ 50 USC 414(a)(1).

²⁹ U.S., Department of Defense, Office of the Secretary of Defense, *Operation and Maintenance Overview: Fiscal Year (FY) 2011 Budget Estimates*, February 2010, p. 54.

on such topics as Chinese goals in Asia, Russian policies on arms control, etc. It would be difficult to reduce support to ongoing military operations and Afghanistan and counterterrorism operations in other places to augment border security missions, unless the threat of a cross-border terrorist attack was unusually high. Similarly, if funds are transferred within DOJ or DHS to support those agencies' intelligence efforts, support for other activities will be reduced.

Congress will review relative intelligence priorities, including those relating to border security, in the light of the overall budget. In some cases budgetary adjustments may be necessary or intelligence priorities realigned. Given the stated intention of many Members to reduce budgets of Federal agencies, there will be advantages in ensuring that any changes in intelligence and law enforcement support to border security efforts are effectively coordinated to ensure that important targets are not neglected and that there is not a significant imbalance between collection and analysis.

Deconfliction

When law enforcement and intelligence agencies are conducting sensitive and highly compartmented operations, there is always a possibility that one agency is operating without full understanding of another's undertakings. In the past there have been instances when a foreign contact has been supported by more than one U.S. agency. Another concern is that U.S. agencies might be working with foreign operatives whose own goals are different and potentially contradictory. In the past, intelligence agencies have been criticized for using sources whose human rights records were poor. Both law enforcement and intelligence agencies have long experience in working with such issues, and decisions can be referred to policy levels. Congress may wish to review procedures used to ensure that different U.S. agencies are not working at cross purposes and that there is overall coordination within the Executive Branch.

Civil Liberties of U.S. Persons

Border security issues often involve U.S. persons as well as foreign nationals—the U.S.-Mexico and U.S.-Canada borders are surrounded by individuals and families with ties to both countries and there is a constant stream of travel and commerce across borders. This factor presents special challenges to the Intelligence Community and especially to those agencies that have statutory foreign intelligence but not law enforcement missions (such as CIA and NSA). There is strong determination by many, including some Members of Congress, that information should not be collected about U.S. persons outside the constitutional and statutory framework that governs the work of law enforcement agencies although current law provides a role for NSA and other intelligence agencies in circumscribed situations.³⁰ From time to time, intelligence agencies have inadvertently collected or retained data on U.S. persons and, at times, there has been a willingness within the Executive Branch to accept a degree of U.S. person collection by intelligence agencies that some have viewed as excessive or illegal. The ensuing controversies have undoubtedly complicated the work of intelligence agencies. Congressional oversight based on a complete awareness of the goals and practices of the program may arguably reduce the likelihood of similar situations in the future.

³⁰ See CRS Report RL33424, *Government Access to Phone Calling Activity and Related Records: Legal Authorities*, by Elizabeth B. Bazan, Edward C. Liu, and Gina Stevens.

Despite the statutory changes enacted after 9/11, concerns about potential collection on U.S. persons continue to have pervasive influence and have limited the ability to use national intelligence assets for law enforcement missions.³¹ Although procedures have long been in place to use reconnaissance satellites to provide information for domestic purposes such as monitoring deforestation and natural disasters, efforts to establish procedures for using satellite-derived information for law-enforcement purposes were reversed in 2009.³² Electronic surveillance efforts by NSA that swept up communications involving U.S. persons were strongly criticized and regulated in a series of heavily debated amendments to FISA some of which are not permanent law.³³ Officials at intelligence agencies are keenly aware that gathering information on U.S. persons will be given great scrutiny in the media and by congressional committees. Missions that involve collecting information about U.S. persons present significant challenges and, according to some observers, deter intelligence agencies from becoming involved.

Law enforcement agencies do collect and retain information on U.S. persons, but must proceed in accordance with constitutional and statutory parameters. Overlaps can occur especially in case of counterespionage and counterterrorism and various mechanisms have been officially and unofficially established to share information when appropriate. Investigations undertaken in the aftermath of the 9/11 attacks led to recommendations that information sharing mechanisms (and relevant statutory authorities) be significantly strengthened. All of these agencies are overseen by the two congressional intelligence committees, but most are overseen by other committees as well.

Collecting information related to border security may pose a greater potential for gathering data on U.S. persons than intelligence collection in other parts of the world. Congress may wish to review procedures³⁴ that are in place to restrict or minimize such collection and reporting, and to explore whether the procedures are being uniformly followed. Congress may also review statutory provisions relating to information sharing to determine if there is a correct balance between information availability, security, and the protection of civil liberties.

U.S.-Canada and U.S.-Mexico Relations

Inevitably, approaches taken by the U.S. on border security issues affect relations with Canada and Mexico. Both countries support U.S. counterterrorism and counternarcotics efforts and there are strong ties among the law enforcement and intelligence agencies of the three governments. At the same time, in both countries, especially in their respective medias, there are questions about

³¹ The challenges presented by this issue are reflected in comments by James Clapper early in his tenure as DNI, who indicated that technical experts had approached him with solutions to technical problems in information sharing but “the problem isn’t technical. It’s policy. And so I’ve gotten into the specifics of this, and we’re still working off some issues related to the aftermath and lessons learned from the Christmas bomber. And the greatest inhibitor we have right now is the protection of data and the handling of data that pertains to U.S. persons. And I frankly had not appreciated previously the complexity of the legal policy issues associated with this. And again, there’s a balance between security and civil liberties. So we’re rather painstakingly working through these issues.” Office of the Director of National Intelligence, “Remarks and Q and A By Director of National Intelligence Mr. James Clapper, 2010 Geospatial Intelligence Symposium,” November 2, 2010.

³² See CRS Report RL34421, *Satellite Surveillance: Domestic Issues*, by Richard A. Best Jr. and Jennifer K. Elsea.

³³ In addition to CRS Report RL34279, *The Foreign Intelligence Surveillance Act (FISA): An Overview of Selected Issues*, see also CRS Report R40138, *Amendments to the Foreign Intelligence Surveillance Act (FISA) Set to Expire February 28, 2011*, by Anna C. Henning and Edward C. Liu.

³⁴ See section 2.3 of E.O. 12333.

some aspects of U.S. policies and the roles of U.S. intelligence agencies. Canada has expressed concerns with some U.S. counterterrorism initiatives and allegations of mistreatment of some Canadian citizens by U.S. intelligence officials have been widely disseminated. Mexico is engaged in an intense and violent campaign against drug traffickers and has worked closely with U.S. agencies, especially through the Mérida Initiative,³⁵ even as Mexican officials believe that their northern border security is jeopardized by illegal importation of weapons and currency from drug profits from the U.S.. Some Mexican writers have long been critics of the CIA and other U.S. intelligence agencies, and some previous U.S. counternarcotics efforts in Mexico have had significant political and diplomatic ramifications.³⁶ There is potential that the role of U.S. agencies in border security efforts may draw criticism in both Canada and Mexico and make cooperation more difficult. Intelligence efforts in Canada and Mexico may become important factors in overall diplomatic relationships and Congress may choose to review relations with the two countries that are affected by border security initiatives.

Conclusion

A role for intelligence agencies in the broader border security effort exists even if it cannot be publicly discussed in significant detail. There are, however, significant issues that Congress may examine in order to ensure that U.S. borders are as secure as possible, that the global missions of the Intelligence Community are not downgraded, that waste and duplication of effort are avoided, that the civil liberties of U.S. persons are respected, and that Canada and Mexico remain close partners in preventing narcotics smuggling and terrorist activities.

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³⁵ See CRS Report R41349, *U.S.-Mexican Security Cooperation: the Mérida Initiative and Beyond*, by Clare Ribando Seelke and Kristin M. Finklea.

³⁶ The counternarcotics work of U.S. officials has occasionally led to significant controversy. In 1985 one DEA agent, Enrique Camarena, was assassinated in Guadalajara. Two suspects in the murder were captured and brought to the U.S. for trial without authorization or assistance from the Mexican Government, a process that was strongly criticized by Mexican officials.